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Pherrel Draper and Nell Fairbanks Draper, his wife, J.B. Dunn and Juliet Crisman Dunn, his wife, Jack C. Dunn and Gladys Wiley Dunn, his wife, Glen Draper and Lorna F. Draper, his wife, R.L. Reinsimar and Margaret Draper Reinsimar, his wife, Ernest J. Pedler and Virginia A. Pedler, his wife, Henry L. Butler and vivienne Draper Butler, his wife, and Charles P. Rudd and Gladys M. Rudd, his wife v. J.B. and R.E. Walker, Inc., a corporation : Brief of Respondent

Utah Supreme Court

Franklin Riter; Fred L Finlinson; Attorneys for Defendant and Appellant.

Mulliner, Prince and Mulliner; Irwin Clawson; Attorneys for Plaintiffs and Appellees .

IN THE SUPREME COURT
of the
STATE OF UTAH

PHERREL DRAPER and NELL FAIRBANKS DRAPER, his wife, J. B. DUNN and JULIET CRISMAN DUNN, his wife, JACK C. DUNN and GLADYS WILEY DUNN, his wife, GLEN DRAPER and LORNA F. DRAPER, his wife, R. L. REINSIMAR and MARGARET DRAPER REINSIMAR, his wife, ERNEST J. PEDLER and VIRGINIA A. PEDLER, his wife, HENRY L. BUTLER and VIVIENNE DRAPER BUTLER, his wife, and CHARLES P. RUDD and GLADYS M. RUDD, his wife,
Plaintiffs and Respondents

— vs. —

J. B. and R. E. WALKER, INC., a corporation,
Defendant and Appellant.

Case No.
7685

Brief of Plaintiffs and Respondents Rudds

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IN THE SUPREME COURT
of the
STATE OF UTAH

PHERREL DRAPER and NELL FAIRBANKS DRAPER, his wife, J. B. DUNN and JULIET CRISMAN DUNN, his wife, JACK C. DUNN and GLADYS WILEY DUNN, his wife, GLEN DRAPER and LORNA F. DRAPER, his wife, R. L. REINSIMAR and MARGARET DRAPER REINSIMAR, his wife, ERNEST J. PEDLER and VIRGINIA A. PEDLER, his wife, HENRY L. BUTLER and VIVIENNE DRAPER BUTLER, his wife, and CHARLES P. RUDD and GLADYS M. RUDD, his wife,

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Brief of Plaintiffs and Respondents Rudds

With the permission of the Court the respondents' brief will be divided into two parts to meet the two main divisions of appellant's brief. This brief will consider the right-of-way portions of the appeal. Substantially the only difference as to the facts is that which would seem to be more logically considered in connection with the matter of waiver and is set forth, beginning of page 16.

Most of appellant's brief is devoted to a claim of error because the court:

1. Refused to strike all evidence relating to a right-of-way.

2. Overruled appellant's objections to the admission of evidence concerning the same.

3. Made a finding that a right-of-way by necessity existed and

4. Required the defendant to provide access to Rudd's property.

The basis of the objections is that the litigating of a right of way was not within the pleadings and the introduction of the evidence concerning it was objected to throughout the trial. For instance at the top of page 37 of the appellant's brief is found the statement:

> "During the entire course of the trial the defendant objected to the admission of evidence of this nature."

Neither of these contentions are correct.

Before answering the brief of the Defendant and Appellant it might be well to first consider the purpose of the complaint.

THIS IS A PROCEEDING TO ENJOIN EXISTING NUISANCE AND FOR DAMAGES CAUSED THEREBY

In general, the nuisances complained of are:

1. Poluting the air with dust,

2. Disturbing the peace with sounds and lights, and

3. Obstructing the means of ingress and egress or right of way.

This brief will be devoted to the consideration of the objections relating to the last of these three, the nuisance arising from obstructing the right of way.

OBSTRUCTION OF A WAY IS A NUISANCE

In Salter v. Taylor, 55 Ga. 310 a private way was blocked by the erection of a fence across it. This action was brought to abate the barrier as a nuisance. The judgment abating the nuisance was affirmed. In doing so, the court said:

> "1. Was the fence a private nuisance? Blackstone says: ' A nuisance signifies anything that worketh hurt, inconvenience or damage.' And again he says: 'If I have a way annexed to my estate, across another's land and he obstructs me in the use of it, either by stopping it, or putting logs across it, or plowing over it, it is a nuisance.' Chitty's Blackstone, 3rd Book 215, 218. This fence then was a nuisance."

In Frick v. Kansas City et al., 93 S.W. 351, 117 Mo. A 488, a sewer contractor piled surplus dirt on a vacant lot adjoining that owned by the Plaintiff and did not remove it promptly, thus barring access to Plaintiff's property. There the court said:

> "The formation and maintenance *of these embankments,* as detailed, *constituted a private nuisance* . . . and the defendants are liable to the plaintiff for her damages, that directly resulted from such nuisance." (Emphasis added.)

In Cadigan v. Brown, 120 Mass. 493, it is said:

> "This is a bill in equity alleging that each of the plaintiffs is the owner of a lot of land abutting on a passageway five feet wide, and, as appurtenant thereto, has a right of way over said passageway in common with others; that the defendants have commenced to build a house at one end of the passage-way, so as to narrow the width of the entrance to about four feet, and have raised the grade and filled up a part of the passage-way so as to injure the access to the lots of the plaintiffs.
>
> The prayer is that the defendant be restrained from building the house, that the said obstructions may be removed and for general relief. The defendants demur, upon the grounds that the plaintiffs are improperly joined, and that they do not state a case which entitles them to relief in equity . . . This is a private nuisance, which entitles the plaintiffs to relief in equity . . ."

In Schaidt v. Blaul, 6 Atl. 669, 66 Md. 141, an alleyway afforded the only access to a creek from which plaintiff in the winter obtained ice for his butchering. This was obstructed.

> "In the language of the authorities, this obstruction 'reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed.' It has been long settled that such a wrongful act will be enjoined in equity."

In Holmes v. Jones, 7 S.E. 168, 80 Ga. 659, where a way of necessity was obstructed it was held that such was a nuisance and it was abated.

In Dries v. City of St. Jospeh, 73 S.W. 723, 98 Mo. A. 611, the city blocked one end of a private alley. This was held to be actionable.

Mr. Wood has this to say on the subject:

> "It may be stated, generally, that *any* interference with a private way, by the landowner or any other person, that materially interferes with its convenient use, or by the owner of the right of way is a nuisance, to recover the damages for which an action on the case will lie." Wood on the Law of Nuisance, section 170. (Emphasis added.)

In Donovan v. Pennsylvania, Co., 199 U.S. 279, 50 L. Ed. 192, 26 S. Ct. 91, the railroad brought the action to enjoin the competing cab drivers from invading the station to solicit patronage and from congregating on the sidewalk so as to interfere with ingress and egress to and from the station. The court held that the railroad was entitled to the injunction sought and quoted with approval and, through Mr. Justice Harlan, in part, said (199 U. S. 279, 302; 50 L. Ed. 192, 202 26 S. Ct. 91):

> "The general doctrine is correctly stated in Dillon on Municipal Coporations: 'For example, an abutting owner's right of access to and from the street, subject only to legitimate public regulation, is as much his property as his right to the soil within his boundary lines . . . When he is deprived of such right of access, or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property.'"

In Garitee v. Mayor et al., 53 Md. 422, where the

plaintiff had a wharf which became useless by the defendants' acts in dredging and dumping the waste near the wharf, it was held to be an interference with a means of access and a nuisance.

In Strong v. Sullivan, 181 P. 59, 180 Cal. 331, where a restaurant owner complained of the parking of a portable lunch stand near the entrance to his restaurant thus interferring with the right of access, it was held to a nuisance.

In Barber v. Penley, L.R., 2 Ch. Div. 447 (1893) where "Charley's Aunt" was attracting such crowds to the Globe Theatre as to block ready access to plaintiff's premises it was held to be a nuisance.

A similar blocking of the access to property by crowds waiting for service, with a like declaration of the law is found in Shamhart v. Morrison Cafeteria, 32 S. 2d 727, 159 Fla. 629.

To the same effect see:

Smith v. Mitchell, 58 P. 667, 21 Wash. 536;
Merchants Mutual Telephone Co. v. Hirschman, 87 N.E. 238, 43 Ind. A. 283;
Harman v. Louisville, U. O. & T. R. Co., 11 S.W. 703, 87 Tenn. 614;
Fritz v. Hobson, L.R., 14 Ch. Div. 542;
Fitzgerald v. Smith, 271 P. 507, 94 Cal. A. 480;
Lane v. San Diego Electric Ry., 280 P. 109, 208 Cal. 29;
Cassel v. City of New York, 153 NYS 410;
George Washington Inn v. Consolidated Machinery, 75 F 2d 657;

Lowell v. Pendleton Auto Co., 261 P. 415, 123 Ore. 383;

Wissler v. Hershey, 23 Pa. St. 333;

66 CJS 780; 46 CJ 689.

THE COMPLAINT STATES A CAUSE OF ACTION FOR NUISANCE

It is there alleged (R. 1) that the defendant is operating a sand and gravel processing plant near the homes of the plaintiffs; that in the course of the operation heavy machinery is operated; that in the operation of such machinery and the maintenance of huge stock piles of sand and dirt that great quantities of dust arise in the air and are carried to and deposited on the plaintiffs' property and food; that in the operation and repair of the equipment loud noises and flashing lights are emitted so as to interfere with normal conversation and sleep of plaintiffs; that the defendant has dug away the roads and placed huge stockpiles of sand and gravel so as to obstruct and block the roads, rights of way and means of ingress and egress; that these matters constitute a nuisance and ruin the value and enjoyment of plaintiffs' adjacent property. In the prayer it is sought to enjoin continuance of the nuisance and for damages.

It is not, and can not be, contended that the complaint does not state a cause of action.

Inasmuch as the complaint does state a cause of action resulting from the creation and operation of a nuisance, that would dispose of all of the matters raised by appellant under Point I.

Without waiving this disposition of appellant's first point, for the sake of discussion, let us see if appellant did not waive all rights to now object.

IN THE COMPLAINT THE PLAINTIFFS CLAIM AN OBSTRUCTION OF A RIGHT-OF-WAY

In the complaint it is alleged in part:

> "6. That in the operation of said gravel plant aforesaid, defendant . . . moves great great quantities of dirt . . . and by . . . the stockpiling of the resulting sand and gravel, the *roads, lanes,* and creek located on the lands of the plaintiffs and in the vicinity thereof, have become obstructed." (R. 2)
>
> "7. That in the operation of the said gravel plant aforesaid defendant has . . . changed the terrain from its original state, *has dug away the roads and placed huge stock piles of sand and gravel, so that defendant has blocked and made parts of plaintiffs' property inaccessible by obstructing rights of way, paths and other means of ingress and egress to the property* of the plaintiffs . . ."

Again in the last sentence of Paragraph 8 of the complaint it is alleged, in part:

> "8 . . . That the operation of said gravel pit and processing plant, as aforesaid, . . . is . . . an *obstruction to the free use and access to their property . . .*"

The prayer also relates to the matter as follows:

> "Wherefore, plaintiffs pray . . . that the defendant be required and ordered by the court to *restore all rights of way, paths and other means of ingress and egress to their premises. . . .*" (Emphasis added.)

In the foregoing, complaint is made of the blocking and destruction of roads, lanes, rights of way, paths, access and other means of ingress and egress to and from the property of the plaintiffs. Nothing could be broader than these allegations. There is no restriction of the complaint to public roads, or to private roads, lanes or rights of way granted by deed or otherwise. It includes public roads, private roads, lanes, rights of way of all types, and all "other means of access," "ingress and egress."

As pointed out above, this action was for the remedy afforded for a nuisance. The nuisance consisted of polution of the air with dust, disturbing the peace with irritating sounds and lights and the interference with the right of access, all caused by the way the defendant operated its gravel and crushing plant. The rights infringed were several but they all resulted from the operation of the plant. The flashes of light made in welding were caused by a different operation than the sounds caused by hammering off the "beads" following the welding. These sounds were caused by a different operation than those which resulted from the giant crushers breaking large boulders. And while some dust came from that same crushing, much of it came from the dropping of the earth before and after the crushing and from the building and maintaining of the huge stock piles. These stock piles were also the obstructions across the means of access. The whole thing was one integrated operation of which the obstruction was a part and the polution of the air and the disturbance of the peace were also a

part. It was so alleged and the issue tendered to the defendant.

Whether defendant could have required a separate and previous trial of the issue of the ownership of a right of way is not an issue here because,

NO STEPS WERE TAKEN TO REQUIRE A MORE DETAILED STATEMENT OF THE ISSUE OF A RIGHT OF WAY

The defendant filed (R. 9) a general and a special demurrer based on misjoinder of parties and of causes and the failure to separately state and on the uncertainty as to the amount of damages suffered by each plaintiff. But in these general statements no objection was made as to the sufficiency of the allegations concerning the nuisance arising from interference with our right of way. Nor was it urged in the demurrer nor in the argument thereon that the cause of action on the nuisance arising from obstructing the ways and means of access should be separately stated nor applified by stating the kind of a right of way claimed nor the source of the same.

A motion to make more definite and certain was also filed (R. 11) but in its two pages and six paragraphs the only enlightenment desired on rights of way is found in paragraph 4 where defendant seeks to require plaintiffs to set forth "the *exact location* of the rights of way, paths and other means of ingress and egress . . ." Nowhere is there a suggestion that defendant needed more information as to what rights of way plaintiffs claimed

nor as to what rights might be referred to as "other means of ingress and egress" nor as to the source of the same.

This was a proceeding for an injunction to abate a nuisance and to recover damages suffered. The demurrer was properly overruled because a nuisance, involving the blocking of means of access and other invasions of rights, was sufficiently alleged.

The appellant seeks comfort from the answers to the interrogatories. They are as barren of help for the appellant as the complaint is. The interrogatory in question (R. 23) was this:

> "4. Will the plaintiffs set forth the *exact location of the rights of way, paths and other means of ingress and egress* to the property of plaintiffs which they allege in Paragraph 7 of their said complaint to have been obstructed and blocked by defendant's action?"

To this the plaintiffs Rudd answered (and their answer was adopted by plaintiffs Pedler (R. 28) as follows:

> "4. Answering the fourth interrogatory, the plaintiff states that the exact location of the said right of way cannot be accurately stated because the ground over which it passed has been excavated but that the said right of way passed from the southerly end of the old mill property in a southeasterly direction until it joined with the part of the road which still remains and such right of way was northwesterly from this plaintiff's property, and that said right of way at all times was easterly and northerly from the Big Cottonwood Creek and ran somewhat parallel to the

same although at varying distances to the eastward and northward from the said Creek."

The question is directed, not to whether the way claimed is public or private, an easement granted by deed, one obtained by prescription or by necessity, but merely to *where* it was located. The answer therefore covers that point only, setting forth its location. There is no help here for the claim of the appellant that the litigation related to public roads only.

Furthermore the interrogatories themselves reveal the broad issue of "ways' claimed by the plaintiffs. Notice the breadth of defendant's (appellant's) inquiry:

> "4. Will the plaintiffs set forth the exact location of the *right-of-way, paths and other means of ingress and egress* to the property of plaintiffs . . ."

The inquiry is *not* of roads or highways but of "rights-of-way, paths and other means of ingress and egress." Certainly these included rights of way by necessity.

> "A right of way can be created by grant, either express or implied . . . There are two kinds of implied grants of rights of way: (1) Ways by necessity, and (2) Ways by prescription." 17 Am. Jur. p. 936.
>
> "This incorporeal heriditament is a right of private passage over another's land. It may arise either by grant of the owner of the soil, or by prescription which supposes a grant, or from necessity." 3 Kent Commentaries (13 Ed.) 581 (star page 419).

Not only was the appellant's inquiry of rights-of-way but also of *"other means of ingress and egress"* in accordance with the allegations Paragraph 7 of the complaint. Clearly the easement by necessity was one of the matters alleged in the complaint and observed by the respondent.

To say that the only way referred to in the complaint or interrogatories was a public one is to ignore the obvious. No broader allegations, as to the rights which were invaded, could be made in the complaint than:

> "7. . . . that defendant has blocked and made parts of plaintiffs' property inaccessible by obstructing rights-of-way, paths and other means of ingress and egress to plaintiffs' property." (R. 3)

The "roads, lanes, rights-of-way, paths and other means of ingress and egress" are as broad as it is possible to make them.

The issue of the obstruction of these roads, rights-of-way and other means of access were clearly and unmistakably raised by the complaint.

Now what does the answer do on this subject? It merely denies the obstruction of the rights of way, roads, and other means of access in a general denial of all the acts of trespass alleged. See paragraphs 6, 7, & 8. (R. 21)

Clearly the issue made by the pleadings, or the pleadings and the interrogatories, is whether defendant did deny access to plaintiffs' property and not whether plaintiffs had a right of access. If the issue of right of access was as important to defendant then as it became

on the sixth day of trial and as is now urged, the defendant had ample opportunity to raise that issue. However in the demurrer, motion to make more certain, interrogatories and answer the defendant failed to question wherein the right of access arose but contented itself with denying that its acts in preventing access constituted a nuisance.

AT PRE-TRIAL NO ISSUE OF THE RIGHT OF ACCESS WAS RAISED

The issue which the court found from the pleadings was (R. 30):

> ". . . whether the operations of the defendant constitute or result in a nuisance . . ."

This was stipulated by the parties as the issue to be tried. (R. 31)

Again the defendant waived any issue as to plaintiffs' authority to use the right-of-way and contented itself with taking the negative of the issue, that its operations in blocking and interferring with the "rights-of-way" and "other means of ingress and egress" constituted a nuisance. That was the dispute between the parties and so it remained up until the sixth day of trial. There was no dispute as to whether plaintiffs had a right-of-way, by necessity or grant, in company with all the public or otherwise, but only as to whether defendant interferred with the passage and whether that constituted a nuisance.

It is submitted that the time to frame the issues so as to require Plaintiffs to specify whether the right they claimed was a private right and whether it has held by

prescription or necessity, had passed without defendant raising the question. This would also seem to dispose of appellant's Point I, but there is still a further waiver by defendant.

ALL OBJECTION TO THE TRIAL OF THE ISSUE OF A RIGHT-OF-WAY WAS WAIVED

This was done by permitting the introduction of evidence on the matter without objection.

This is governed by Rule 15 (b) of the Utah Rules of Civil Procedure which reads as follows:

> "(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; *but failure so to amend does not affect the result of the trial of these issues.* If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence." (Emphasis added.)

Concerning similar rule in the Federal practice it is said in Moore Federal Practice:

> "At the trial, Rule 15 enables the case to be litigated on the merits. It does this in two ways: (a) in effect pleadings are automatically amended to conform to proof on issues tried by express or implied consent.[9] . . . The sporting element in litigation is eliminated."

And in note 9, referred to in the text, we read:

> "9. This is true because Rule 15 (b) provides: 'Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.' " (3 Moore Federal Practice (Rev. Ed.) p. 805, sec. 15.02)

Now did defendant impliedly consent to the trial of the issue of a road, right-of-way or other means of ingress and egress? Defendant maintains in his brief that it did not impliedly consent but objected throughout the trial. The transcript does not bear out this assertion. The following evidence on the subject of roads, rights-of-way and other means of access was introduced without objection:

(R. 209, line 10) (By Mr. J. Richard Mulliner.)

"Q. Now Mr. Draper, you have lived around this place since—been acquainted with it since about 1929. Is that your testimony here?

A. Yes, that is right.

Q. Now are you acquainted — I will ask you if in 1929 you know by what means of access, what the means of access was to — egress to and access from the home, to and from the home, which is now the Pedler home?

A. The only way they could get into their home was entering in from the highway at the Old Mill Club property and then traveling to the south and east along toward the Old Mill Club Reservoir and entering through a gate there into the Pedler home.

Q. Would you describe this roadway if you will?

A. This roadway was a well defined roadway properly kept up because it was the only means of getting into the Pedler property.

Q. Do you have any present recollection of this roadway in 1929?

A. Yes.

Q. What is that, what facts bring that to your mind at the present time?

A. I worked for the Old Mill Club at that time, and one of our duties was to keep the leaves and shrubs out of the springs that furnish the water to the Old Mill Club, and I would go up there at least two or three times a week in the performance of that duty.

Q. In 1929 was this roadway kept up?

A. Yes.

Q. And for how long was this road open if you recall?

A. Well, I remember this road there in 1926. My wife and I used to drive up to that spring on our week-end days and get water cress out of that spring.

Q. And in 1926 was there a well defined roadway?

A. Yes, the only difference was then there was a bridge across the Old Mill Club race and that was in rather bad shape, but I think that was fixed up in the spring of 1929.

GENERAL RITER: Mr. Mulliner, will you

invite my attention to the allegations concerning this roadway in your complaint?

MR. J. RICHARD MULLINER: Yes, sir. Your interrogatories direct—

THE COURT: I didn't get that last date.

(The last answer was read by the Reporter.)

MR. J. RICHARD MULLINER: With reference to the rights of ingress and egress.

THE COURT: You are reading from the interrogatories.

GENERAL RITER: I don't believe those interrogatories raise the issues.

MR. J. RICHARD MULLINER: I just want to show it is in the complaint some place.

GENERAL RITER: I want you to point out to me where that allegation is that you are directing your interrogation.

MR. J. RICHARD MULLINER: Paragraph seven about changing the terrain from its original state.

(Mr. Mulliner read Paragraph seven in the complaint.)

GENERAL RITER: Thank you very much.

Q. (By Mr. J. Richard Mulliner) Is that road way in existence at the present time, Mr. Draper?

A. Well, the gravel fill is used there up as far as the stock piles.

Q. By gravel fill do you mean J. B. and R. E. Walker, Incorporated?

A. Yes, but from there on it is obstructed.

Q. And how is it obstructed?

A. Well, these stock piles obstruct it in the beginning.

GENERAL RITER: Now if the Court please, I wanted this interrogation to get along that far

to give me a chance to make my record and object. There is no evidence to show that Pedler or any of the plaintiffs had any right to use that roadway.

THE COURT: There is no evidence showing that there is a right-of-way.

GENERAL RITER: No evidence showing there is a right-of-way.

THE COURT: The Court will grant that.

GENERAL RITER: I move to strike this entire evidence at this time because there must be evidence to show their right to use it, and the records, as they now stand, show there has been no right, no title.

MR. J. RICHARD MULLINER: I expect to tie that up, your Honor.

THE COURT: The motion will be taken under advisement. The Court will determine whether or not there is any evidence on the subject before ruling on it.

Q. (By J. Richard Mulliner) I show you the third picture in Plaintiffs' Exhibit RR and will ask you if any part of that right-of-way is visible on that photograph?

A. Yes.

Q. Would you indicate where with relation to objects on that photograph the right-of-way of this roadway was?

A. That entered just to the right of the stop sign and went up through where you see the dust.

Q. That was the original roadway proceeding there in 1926, was it?

A. Yes.

Q. And has it existed to your own knowledge ever since 1926?

A. Yes.

Q. Now, if you will state, Mr. Draper,—

GENERAL RITER: Can I look at that a minute, please?

THE COURT: You didn't show the nature of these obstacles.

MR. J. RICHARD MULLINER: I was just getting to that.

Q. (By Mr. J. Richard Mulliner) Now would you state again what are the nature of the obstacles to this roadway there at the present time?

A. Well, the stock piles obstruct the road where it existed, and then just as you get to the northwest corner of the Pedler property there has been a ditch dug through there and large boulders at that point making it inaccessible to the Rudd's property.

Q. Is it possible now to drive on this real old road, from the Old Mill, where this old road used to take off the Cottonwood Highway to the Pedler property or to properties east of there?

A. No.

Q. The sand piles that you spoke of are the sand piles at the end of the conveyor belt that appear on Exhibit I?

A. Yes.

Q. And they are built over this roadway?

A. Yes.

Q. Do you know when it was first obstructed?

A. As near as I can remember it was the summer of '46.

GENERAL RITER: If the Court please, so that I won't keep irritating everybody my objection, of course, runs to this entire line of testimony and may the record so show.

THE COURT: As to the obstacle of this roadway to the Pedler property?

GENERAL RITER: As to the testimony pertaining to this road.

THE COURT: It may show that. The objection is overruled.

Q. (By Mr. J. Richard Mulliner) Is it possible at the present time for a vehicle to proceed from the turn off point down by the Old Mill on the Cottonwood Highway up through the Walker Plant to the Pedler and Dunn homes, Rudd homes I should say?

A. It would depend on how far they went. It might be possible to get a car in there, but the road as it existed is plugged up.

THE COURT: By that you mean they may drive in there but not on the old road. By that you mean they might, they could get a car into the Pedler property of the Old Mill, but not on the old road?

THE WITNESS: No, it would be possible to get a car in, but they wouldn't get a car in like they did.

Q. (By Mr. J. Richard Mulliner) Is there any defined road at all there you could see?

A. After you leave the corner of the Pedler property where it is plugged off, you can see the road from there, leading on from there, to the Rudd property, and also you can see it from the Old Mill entrance up to the stock piles.

Q. By that you mean you can see road from Pedler's property east to the Old—

A. Yes.

Q. And from the Old Mill up to the stock pile.

A. Yes.

Q. Is there any right-of-way or anything discern-

able over the Walker property, the lower plant property itself to the stock pile?

A. No, they might swerve around there in some manner, but as far as the road is concerned it is blocked off."

It is to be noted that the testimony that this road was the only way they could get into their property (R. 209, line 18) was introduced without objection. It was further testified that the road was well defined and had in existence in 1926. It was at this point that the appellant inquired as to where the allegations in the complaint as to the roadway were to be found and that when paragraph 7 was pointed out, counsel for Appellant still made no objection (R. 211, line 4) and it was not until further evidence was introduced as to the obstruction of the right of way that an objection was made. Certainly it can't be claimed that this evidence concerning the road, its antiquity, location, appearance and obstruction which was testified to, was introduced over the objection of the appellant. There was no objection at all until appellant protested as follows:

"GENERAL RITER: Now if the Court please, I wanted this interrogation to get along that far to give me a chance to make my record and object. There is no evidence here to show that Pedler or any of the plaintiffs had any right to use that roadway.

THE COURT: There is no evidence showing there is a right-of-way.

GENERAL RITER: No evidence showing there is a right-of-way." (R. 211, line 13).

And even when an objection was raised as to the testimony, it was not that the evidence was outside of the issues but rather that there was at that time no evidence that the plaintiffs had a right to use that roadway or that a right-of-way existed. But there was no objection to the litigation of that issue.

Later (R. 213, line 9) appellant stated that the "objection, of course, runs to this entire line of testimony" and again (R. 213, line 14) "As to the testimony pertaining to this road." But the objection which it is sought to have run to all subsequent questions is not as to whether the pleadings were broad enough to support the issue of a right-of-way or road or access over this property used by the appellant. The objection adopted was merely that (R. 211, line 15) "There is no evidence here to show that . . . the plaintiffs had a right to use that roadway . . . (R. 211, line 19) no evidence showing there is a right of way." (It is to be noted that in appellant's brief no effort is made to rest on this premature objection, that there was no evidence of a right-of-way nor that plaintiffs had a right to use it.)

Later further evidence of the road, right-of-way, or means of access was introduced without objection. On the third day of trial Mr. Reinsimar testified that he remembered the road in 1912 (R. 342, line 16); and that it ran up to Rudds (R. 342, line 20); that it was an old road then (R. 342, line 27) and he further described it (R. 343). Still there was no objection that the nuisance result-

ing from obstruction of the right of way, was not within the issues.

Mr. J. B. Dunn testified he remembered the road between the Old Mill and Rudds as far back as 1929 (R. 372). He was cross examined concering its location (R. 375).

Mr. Henry Butler testified on the fourth day of the trial, without objection, that he remembered the road as far back as 1918 (R. 520 and 521) and that it went up to the Rudd cabin from the parking lot at the Old Mill.

On the same day the following remarks were made (R.572, line 23) :

> "GENERAL RITER: What are your contentions?
>
> MR CLAWSON: *That we have a way of necessity;* we have a way on prescriptive right, and possibly it is a public road under County ordinances.
>
> GENERAL RITER: You haven't plead the County ordinances.
>
> MR. CLAWSON: We may have to." (Emphasis added.)

Here, clearly, was the contention made that the way might be claimed as one of necessity. Yet there was no objection that such a way was not within the issues.

Charles Rudd testified one couldn't get into his cabin, except over this road (R. 580, line 24) but there was still no objection.

Glen Rudd testified that the road ran from the Old Mill to the Rudd property and that there was no other

way of getting in (R. 584) and that it was an old road when he remembered it first (R. 585).

It was not until after all of this testimony was received, and on the sixth day of trial, November 1, 1950, that the first objection was made wherein it was claimed that the right-of-way was not within the issues (R. 651, line 14).

So we submit that appellant did not object to the trial of the issue of roads, rights-of-way and means of access but contented itself by merely objecting (R. 209, line 10 et seq.), after the ground had been substantially covered without objecting; that respondent had not, up to that time, shown a right to use this road or that there was a right-of-way (R. 211).

Under Rule 15b of the Utah Rules of Civil Procedure, the enlarging of the issues is permitted. If such action prejudiced the appellant, a continuance would have been granted. No continuance was sought. And the trial lasted from October 23rd to November 29th with numerous interruptions in the five week interval. Appellants can't say they have been prejudiced. This is merely a point made on appeal, one which was not of sufficient importance to raise before or during the trial of this case.

Point No. 2 (found on page 54 of Appellant's brief, raises the question of the adjudication of the question of a right of way without the presence of one of the principal stockholders of appellant (paragraph 3 of Ex. UUU) and the wife of the president of the appellant. This is merely another way of saying that a non joinder is claimed.

NON JOINDER IS WAIVED BY FAILING TO RAISE THE POINT UNLESS THE PARTY IS INDISPENSABLE THE OWNER WAS NOT INDISPENSABLE.

In the case of In Re Thompson's Estate, 269 P. 103, 108; 72 Utah 17, this court (Justice Straup speaking) said:

> "The assignment that the widow ought to have been made a party is overruled. Under our Code, defect of parties is something to be taken advantage of by special demurrer or by answer. The special demurrers were on grounds of ambiguity and uncertainty, and not on grounds of defect or want of parties. Nor was the matter raised by answer. Unless raised by demurrer or by answer, the defect was waived. Nor do we see wherein the widow was a proper, much less a necessary or indispensable party."

And in Buhler v. Maddison, 166 P. 2d 205, 212; 109 Utah 245, this court said:

> "Lastly, we consider appellant's special demurrer for defect of parties defendant. This objection must fall on two grounds, firstly as not being properly raised, and secondly as not being timely presented to the court. It is said in 39 A. Jr. 110:
>
> " 'Under the common-law practice, and in jurisdictions in which the practice is still fundamentally according to the common law, an objection to the non-joinder of parties can, as a general rule, be taken advantage of only by a plea in abatement, or by a plea or answer in the nature thereof, although there is authority to the effect that at common law if the defect appears on the face of the pleading objection may be taken advantage of by demurrer or in arrest of judgment.' "

Again this respondent refers the Court to the Utah Rules of Civil Procedure (19b) which provide:

> "(b) EFFECT OF FAILURE TO JOIN.
>
> When parties who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to service of process, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them can be acquired only by their consent or voluntary appearance; but the judgment rendered therein does not effect the rights or liabilities of absent persons."

It will be noted that there is no evidence that Mary Golf Walker is a resident of Utah or that she was, between the time of the commencement of this suit and the judgment, in the State of Utah and hence that she was subject to the jurisdiction of this court. This would seem to dispose of the point unless she was an indispensable party. Inasmuch as we are following Federal Rules a case from the Supreme Court of the United States should be helpful on this matter of who are indispensable parties. Mr. Justice Curtis spoke for that court in the case of Shields v. Barrows (17 How. 130, 136; 15 L. Ed. 158, 160):

> "The court here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which re-

> quires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons, not before the court, the latter are not indispensable parties.
>
> 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The California case of McKelvey v. Rodriguez, 134 P. 2d 870, 874; 57 Cal. A. 2d 214, is in point. There an action in ejectment or payment of the purchase price was begun by the executor of the deceased seller of real estate against the heir, in possession, of the deceased buyer. No attempt was made to bring in the other heirs of the buyer and the heir sued raised a defense of non joinder. Judgment for the Plaintiff resulted in this appeal. In affirming the decree the court discussed the non joinder and said:

> "The adjudication in the present case was not in effect an adjudication that the contract was in default for failure of the purchaser or her successors to perform the terms thereof, but was merely an adjudication of appellants' default in refusing to pay the balance claimed to be due, upon demand therefor. The other heirs and successors are not

> precluded thereby from taking advantage of any waiver of performance of the terms of the contract. It is thus demonstrated that the interest of appellants is separable in this respect from that of the other heirs. * * * The entire controversy existing between respondents and the heirs at law of Merced Castaneda is not settled by the suit in ejectment against appellants. It has merely been determined that if appellants desire to occupy and enjoy the premises they must pay the balance due on the purchase thereof. The status of the contract and any waiver of strict performance of its terms, with relation to the other heirs, remains undetermined and unaffected by the judgment in the present action."

In another case (Bank of California v. Superior Court, 106 P. 2d 879, 16 Cal. 2d 516) an action was brought upon a promise made to plaintiff by a decedent to leave all the latter's property to the promisee. The action was brought to enforce the agreement. All of the heirs were made parties but only part were served. A motion was made to require the service of summons on the other heirs and, upon an adverse ruling this action for a writ of prohibition was sought. In denying the writ of the court (106 P. 2d at 883) discussed "necessary" and "indispensable" parties and said:

> "These two terms have frequently been coupled together as if they have the same meaning; but there appears to be a sound distinction, both in theory and practice, between parties deemed 'indispensable' and those considered merely 'necessary.' As Professor Clark has remarked: 'It has been objected that the terms 'necessary'

> and 'indispensable' convey the same idea * * *
>
> But a distinction has been drawn. While necessary parties are so interested in the controversy that they should normally be made parties in order to enable the court to do complete justice, yet if their interests are separable from the rest and particularly where their presence in the suit cannot be obtained, they are not indispensable parties. The latter are those without whom the court cannot proceed.' Clark Code Pleading, p. 245, note 21. See, also, as to the distinction in the federal courts, Franz v. Buder, 8 Cir., 11 F. 2d 854, 856; Atwood v. Rhode Island Hospital Trust Co., 1 Cir., 275 F. 513, 24 A.L.R. 156."

In the case at bar the decree has been entered. It has not been shown that the decree in any way affects the rights of the principal stockholder of appellant except as the action affects the appellant itself. It does not attempt to establish as against her that the plaintiffs or some of them have an easement over her land. She is still at liberty to raise that issue.

The appellant cites three cases to show that one of the principal stockholders and the wife, of the president and principal witness, J. B. Walker, was an indispensable party. The first case cited is a Montana one entitled Campbell v. Flaunery et al., 79 Pac. 702, 32 Mont. 119. Here the plaintiffs bought a farm which included a reclaimed creek bottom. The waters which formerly flowed in the creek were diverted across the land occupied but not owned by defendants, over which the plaintiff claimed an easement for this purpose. It doesn't

appear from the court's opinion just why it considered that the land owner was an indispensable party. There is the mere bald statement to that effect. But in analyzing the case this fact becomes evident. We are dealing with the flow of water. Unless the water has a proper outlet it could do great damage by erosion or by being damed up until it broke its confines. Unless there was a right to have the flood waters continue down the diversion ditch great damage could result. Under these circumstances it is conceivable that the court might require the land owner as an indispensable party. But there are no such facts here. We are not dealing with water. There is no damming up of an element until great danger to the land owner is involved. No great damage to the land already being used for the storage of huge stock piles of sand and the pounding of mammoth trucks filled with great loads of sand, could result from permitting the passage of persons and vehicles to the Rudd house. In our case, there is no great danger of a sudden freshet throwing a destructive force against the land. In fact there is no danger of any damage being done to the land over which passage has been had from 1910 on, and apparently from time immemorial. If the interests of the wife of the president of defendant and one of the principal stockholders of the defendant was not sufficiently represented in the case at bar, she can bring a separate action to deny to plaintiffs the right of way which has existed so long and which the lower court found to be one of necessity.

But the portion of the Campbell decision quoted by appellant was mere dicta, as the court points out (in the next sentence to the one quoted by appellant) where it says: "The *main point in this case* . . . is the question whether or not the defendants are estopped by the conduct of defendant William Flaunery . . ."

That this statement is mere dicta is also shown by the fact that the court had already disposed of the question of an easement over the servient estate by pointing out that the defendant had disclaimed to hold by prescription and that the grant claimed was under a statute which did not give an easement. So the statement quoted by appellant is just dicta and as such, is of doubtful authority.

The second case cited is no more assistance to the respondent. In Peryer v. Pennock, 115 Atl. 105, 95 Vt. 313, 17 ALR 863 the action was for specific performance of an installment contract for the purchase of land and (see 95 Vt. 314) for damage for inability to convey a good right of way. Plaintiff sought to compel defendant to accept partial payments before the same were due and to execute a deed and accept a mortgage. The court held this could not be done and reversed the judgment for the plaintiff. However, since defendant was willing to convey upon such payments, etc., if other demands of plaintiff, outside of the contract, were ignored, there remained the matter of plaintiff's claim for damages for inability of defendant to convey the contracted right-of-

way. Defendant claimed the owner of the servient estate recognized the right-of-way. The court, in remanding the case, said the owner of the servient estate should be made a party "if the decree is to have effective force on all concerned. On a remand of this case, the court of chancery should refuse to proceed to make a decree until Goodrich is made a party . . ." But the court does not discuss indispensable parties nor say that the owner of the servient estate was an indispensable party. In fact the court expressly hedges the statement that Goodrich should be made a party by adding, "if the decree is to have effective force on all concerned." The court obviously recognizes that he is not an indispensable party but merely a necessary party if he is to be bound by the decree. But there is no requirement that he be bound if the parties to the litigation do not seek such action. Furthermore it could well be that the owner of the servient estate is an indispensable party. The plaintiff claimed that the owner of the servient estate denied the existence of a right-of-way while the defendant claimed the servient owner recognized the obligation. To really do justice to the parties, the owner of the servient estate was an essential and probably an indispensable party.

The last case cited by appellant (Fox v. Paul, 148 Atl. 809, 158 Md. 379, 68 ALR 520) adds nothing. As it says there, where it is sought to locate a way of necessity the party over whose land such way is to be located must be a party. But in the case at bar it is not sought to bind the principal stockholder of appellant and wife of

of the president of appellant as to the right of way. We merely seek to have a roadway (called variously a road, a right-of-way, a means of access, and a means of ingress and egress) restored. No adjudication of the right of way between these plaintiffs and this stockholder, is sought. The evidence shows that this defendant corporation in utter disregard of the rights of the property owners, scouped out the road, cut the level of the plant pit floor beneath the level of the remaining road and by this means and by piling great quantities of sand and gravel and road aggragate across the pit floor, cut off the access to the property above. It is sought to have this interruption of access terminated and permit passage across the area over which the destroyed road ran.

If we were seeking by this action to obtain a legal adjudication for all time that the plaintiffs or some of them had a right of way across these lands, obviously the owner of the land would be an indispensable party. But that is not this action. Here the plaintiffs seek to enjoin a nuisance which consists in poluting the air, emitting irritating noises and lights and blocking a roadway and compensation for damage done thereby. There is no more reason for holding that the defendants' landlord is an indispensable party in the nuisance suit for obstructing the roadway than for poluting the air.

Furthermore, in answer to the objection that the wife of the president of the defendant and one of the principal stockholders of the defendant, should have made a party and was indispensable in this cause, it is to be observed that the owner did not obstruct the right-of-way. There

is no complaint against her as there is against the defendant.

It is also evident that the fact that defendant is a lessee in possession of the property has nothing to do with the case. Defendant is not being sued as lessee. It could be in there as a rank trespasser and still be liable for any interference with our passage.

Obviously the wife of the president of defendant and one of its principal stockholders, is not an indispensable party and hence the appeal cannot be sustained on the ground of non joinder.

The third point made by appellant is found on page 58 of the brief. Extensive quotations are made from cases as to the trial of law questions in equitable actions and finally two Utah cases are referred to. In both of the latter, a trial by jury was sought before the submission of the cases (Valley Mortuary v. Fairbanks, ... Utah ....., 225 P. 2d 739, 743, referred to at the bottom of page 66 of appellant's brief, and Norbeck v. Board of Directors etc., 37 P. 2d 339, 84 Utah 506. We have no quarrel with the law there set forth. It just has no application to the facts in this case. In the case at bar no demand for a jury was made before the trial, as required Rule 38 of the Utah Rules of Civil Procedure. Appellant admits that no demand was made (page 66 of brief) but says that it was excused because it would have been compelled to elect between its position that a way of necessity was not within the issues and consenting to the trial of that issue.

Disregarding, for the sake of the argument, all other answers, it is sufficient to say that when appellant objected to the trial of that issue and lost, then was the time that a demand for a jury should have been made. Rule 39(b) provides in part:

> ". . . but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion *upon motion* may order a trial by jury on any or all issues."

If the trial by jury of this issue was as important before the appellant lost the case as it now seeks to make out, why didn't the appellant request a jury when its objection was overruled? The trial by jury was waived first in not demanding it before trial (Rule 38) and second in failing at any time throughout the five weeks of trial to move the court to submit that issue to a jury. Appellant does not show the diligence required to obtain a jury by delaying until after an adverse decision to first talk of one.

Nor is an excuse for the failure to demand a jury aided by the plea that appellant did not know that there was an issue concerning right of way. As pointed out above (see page 8 of this brief) in paragraph 6 of the complaint (R. 2) it was alleged that the stock piling of the sand obstructed the roads and lanes and in paragraph 7 it was alleged that appellant "dug away the roads" and "blocked and made parts of plaintiffs' property inaccessable by obstructing *rights of way, paths,* and

other means of ingress and egress . . ." and, in paragraph 8, obstructed "free use and *access*" and the prayer was "that defendant be required and ordered by the court to restore *all rights of way,* paths and other *means of ingress and egress.*" All of the allegations were denied.

Right of passage by road or lane, public or private and by easement, through grant, prescription or necessity was clearly an issue. If appellant had then been as anxious then for a trial by jury as it is now, a demand could have been made. It did not choose to seek such a trial then as required by Rule 38b even though the issue so submitted to the jury could be limited as permitted by Rule 38c. Nor did appellant at any time during the trial request a jury. It raises this issue for the first time after an adverse decision and, we suspect, merely because of it.

The fourth point (page 67 of appellant's brief) is that a proceeding for an injunction is not the proper means of trying title to real estate. To substantiate this point appellant quotes from several authorities to the effect where "the primary purpose of the suit was to establish an easement" "the right to injunctive relief could not come into existence until the easement had been established . . ." to requote a part of excerpt taken from the Valley Mortuary case (225 P 2d 750) found on pages 69 and 70 of appellant's brief.

Again we have no quarrel with the law cited. It just has no application. The quotation is based upon the premise stated: ". . . that the primary purpose of the

suit was to establish an easement . . ." The primary purpose of our action is not to establish an easement but to curb a nuisance. The complaint seeks to restrain the emitting of disturbing sounds and lights by the operation and repair of heavy equipment and the polution of the air by the operation of such equipment and by the building and maintaining of large stockpiles of sand, gravel etc., and the obstructing of the means of access to plaintiffs' property by the maintenance of the same stockpiles. The obstructing of the "rights of way" and the "means of ingress and egress" were merely incidental to and connected with the other nuisances committed at the same time and largely by the same means. The complaint about the obstruction of the way was not the primary purpose of the action as required under Norback v. Board of Directors etc., 37 P. 2d 339, 84 Utah 506, it was merely an incidental point. More than nine-tenths of the entire testimony requiring five weeks of trial related to matters not involving the right of way.

Appellant's fifth point which is argued beginning at page 71 of its brief relates to a way of necessity and the fact that as such it ceases when the need passes. We have no quarrel with the law but it has no application. There was no evidence that the need for this access road had ceased to exist. And there was positive evidence that the road was the only means of access (R. 580, line 26; R. 581, line 8; R. 584, line 29).

It is respectfully submitted:

1. That obstructions to a right-of-way is a nuisance.

2. That the complaint states a cause of action for nuisance.

3. That in the complaint the plaintiffs claim an obstruction of a right of way.

4. That no steps were taken by demurrer, motion, answer or interrogatories to require a more definite statement of the rights infringed.

5. That at Pre-trial no issue of the right of access, was raised.

6. That all objections to the trial of the issue of right of way was waived by the failure to object to introduction of evidence on the point.

7. That Mrs. Walker was not an indispensable party and her non-joinder was waived.

8. That the defendant and appellant has failed to show any grounds for reversal and the decree below should be affirmed.

Respectfully submitted,

IRWIN CLAWSON,

Attorney for Respondents Rudds